Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. EDWARD TOTTEN,

Petitioner,

v.

BOMBARDIER CORPORATION AND ENVIROVAC, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the False Claims Act, 31 U.S.C. § 3729 *et seq.*, applies to federal monies given by Congress to Amtrak, a grantee, that pays a contractor for goods and services with these federal monies; and whether the complaint in this case establishes a cause of action under the language of 31 U.S.C. §§ 3729(a)(1), (a)(2) and (c).

31 U.S.C. § 3729 (a) (1) of the False Claims Act ("FCA") provides "[a]ny person who knowingly presents, or causes to be presented, to an officer or employee of the United States . . . a false or fraudulent claim for payment or approval; is liable to the United States Government for a civil penalty . . ." 31 U.S.C. § 3729 (c) defines claim to include

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

The U.S. Court of Appeals for the District of Columbia Circuit has interpreted 31 U.S.C. §§ 3729(a)(1) and (c) in a manner inconsistent with Congressional intent and decisions of federal circuits and the Supreme Court by holding that the fraudulent demand for payment must be presented to an officer or employee of the Federal Government, and not a grantee, in order for the False Claims Act to apply. *United States ex rel. Totten v. Bombardier Corp. et al.*, 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. 2004) *(Totten II).*

In *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), a district court has relied on the *Totten II* decision and held that Medicaid claims submitted to a state entity for reimbursement from federal funds are not actionable under the federal False Claims Act. Consequently, hundreds of billions of dollars in federal funds that are given to grantees are in jeopardy.

LIST OF PARTIES TO PROCEEDING

The petitioner is Edward L. Totten, proceeding on behalf of himself and on behalf of the United States of America.

The United States of America is not a party to this matter although the United States of America filed an *amicus curiae* brief in the United States Court of Appeals for the District of Columbia Circuit in support of Totten.

The appellees are Bombardier Corporation and Envirovac, Inc.

CORPORATE DISCLOSURE STATEMENT

Bombardier Corporation

Bombardier Corporation is a corporation organized under the laws of Idaho. Bombardier Corporation is 100% owned by Bombardier Holdings (USA) Inc., a Delaware corporation. The latter company, in turn, is 100% owned by Bombardier, Inc., which is incorporated under the federal laws of Canada. Bombardier, Inc. is publicly traded on the Toronto, Brussels and Frankfurt stock exchanges.

Envirovac

Envirovac provides advanced vacuum waste systems for aviation, commercial, marine, supermarket and train applications. Envirovac is a wholly-owned subsidiary of EVAC International Ltd., a Finland corporation. EVAC International Ltd. is a wholly-owned subsidiary of Sanitec Corporation (aka Sanitec Oy), also a Finland corporation.

In turn, Sanitec Oy is owned by Sanitec International, S.A., a Luxembourg corporation; Sanitec International, S.A., is owned by Sanitec International, A.G., a German corporation; and Sanitec International, A.G., is owned by Pool Acquisition, S.A., a Luxembourg corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO PROCEEDING	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
TABLE OF APPENDICES	x
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
1. Before Totten II, Courts indicated support for a broad reading of the FCA that included claims presented to a grantee such as Amtrak	3
2. As a mixed government corporation under 31 U.S.C. § 9101, Amtrak was the Government	9

Contents

Page

3. Circuit Judge Garland's dissenting opinion hews to the letter and the legislative history of the FCA regarding presentationof claims to federal grantees 13

a. The differing language of subsections (a) (1) and (a) (2) commands an inference that these provisions describe differing ways in which FCA liability can be incurred 13

b. Section 3729(c) further underscores the clear legislative intent to protect federal dollars given to grantees 15

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Page

Supreme Court Cases:

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 14

Lebron v. NRPC,
513 U.S. 374 (1995) 10, 11, 12

Lorillard v. Pons,
434 U.S. 575 (1978) 4

Marcus v. Hess,
317 U.S. 537 (1943) 4, 5, 7, 8

Rainwater v. United States,
356 U.S. 590 (1958) 13

Shapiro v. U.S.,
385 U.S. 1 (1948) 4, 9

United States v. Mexico,
455 U.S. 720 (1982) 11

Federal Cases:

Dart v. U.S.,
848 F.2d 217 (D.C.Cir. 1988) 4

In re North,
50 F.3d 42 (D.C.Cir. 1995) 4

Murray & Sorrenson v. U.S.,
207 F.2d 119 (1st Cir. 1953) 8

Cited Authorities

Page

United States ex rel. Atkins v. McInteer,
345 F.Supp. 2d 1302 (N.D. Ala. 2004) ii

United States v. Azzarelli Construction Co.,
647 F.2d 757 (7th Cir. 1981) 16

United States v. Fed. Maritime Comm'n,
694 F.2d 793 (D.C.Cir. 1982) 4

United States v. Lagerbusch,
361 F.2d 449 (3rd Cir. 1966) 8

United States ex rel. Marcus, et al. v. Hess, et al.
127 F.2d 233 (3rd Cir. 1942) 6

United States ex rel. Totten v. Bombardier Corp. et. al.,
380 F.3d 488, 363 U.S.App.D.C. 180
(D.C. Cir. 2004) ..... *passim*

Federal Statutes:

5 U.S.C. App. 3, Section 8E(a)(2) 11

28 U.S.C. § 1254(a) 1

29 U.S.C. § 1331 1

31 U.S.C. § 231 4

31 U.S.C. § 856 11

31 U.S.C. § 3729, et. seq. ..... *passim*

Cited Authorities

Page

31 U.S.C. § 9101 .....9, 10, 11, 13

49 U.S.C. § 24301 (1) 11

Freedom of Information Act,
5 U.S.C. § 552 ..... 9, 11

Government Corporation Control Act of 1945, Pub. L. 248 (formerly 31 U.S.C. 856), *amended by* Pub. L. 91-518, Section 804 (October 30, 1970) 11

Hobbs Act 4

Rail Passenger Service Act of 1970, Pub. L. 91-518, Section 541 (1970) 9, 10, 11, 12, 13

Rail Passenger Service Act of 1970, Pub. L. 91-518, Section 804 (1970) 11, 12

Miscellaneous:

S. Rep. 99-345, at 8 (1986) 8

S. Rep. 99-345, at 18-19 (1986) 16

S. Rep. 99-345, at 22, *reprinted in* 1986 U.S.C.C.A.N. 5266.. 9

S. Rep. No. 756, 92nd Congress, 2nd Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 6267, 6274 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided August 27, 2004 ..... 1a

Appendix B — Memorandum Opinion Of The United States District Court For The District Of Columbia Filed September 3, 2003 ..... 57a

Appendix C — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Rehearing Filed December 8, 2004 ..... 63a

Appendix D — Statutory Provisions 65a

Edward L. Totten, proceeding on behalf of himself and the United States of America, respectfully petitions for a writ of *certiorari* to review the *en banc* judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The December 8, 2004 Order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing *en banc* is reported at *United States of America, ex rel Edward L. Totten v. Bombardier Corporation and Envirovac, Inc.*, 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. December 8, 2004) and is reproduced at App. C, page 63a. The August 27, 2004 decision of the United States Court of Appeals affirming the decision of the District Court's dismissal of the petitioner's case is reported at the same citation and is reproduced here at App. A, page 1a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on August 27, 2004 and denied rehearing *en banc* on December 8, 2004. The jurisdiction of the District of Columbia Circuit was based on 29 U.S.C. § 1331 and the False Claims Act, 31 U.S.C. § 3729, *et seq.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(a) and Supreme Court Rule 10(c) that the United States Court of Appeals for the District of Columbia Circuit has decided an important federal question in conflict with the relevant decisions of this Court and Congressional intent.

RELEVANT PROVISIONS

Title 31 U.S.C. § 3729(a) provides:

> **Liability for certain acts.** – Any person who–
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; is liable to the United States for a civil penalty of not less that $5,500 and not more than $11,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, . . .
>
> **(c) Claim defined.** – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[1]

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1. A copy of the entire False Claims Act is attached hereto at Appendix D.

STATEMENT OF THE CASE

This matter arises out of the $340 million contract between Amtrak and Bombardier/Envirovac to purchase passenger rail cars. Mr. Totten alleged that Bombardier/ Envirovac knowingly built defective train cars and delivered them to Amtrak. Mr. Totten further alleged that Amtrak was a grantee of the United States of America and used federal funds to repay the principal and interest on the loan which financed the purchase of the train cars from Bombardier/ Envirovac making the False Claims Act applicable to this transaction.

REASONS FOR GRANTING THE WRIT

1. Before Totten II, Courts indicated support for a broad reading of the False Claims Act that included claims presented to a grantee such as Amtrak.

From reading the majority opinion in *U.S. ex rel. Totten v. Bombardier*, 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. 2004), one might conclude that the U.S. Court of Appeals for the District of Columbia Circuit was the first to explain or define "knowingly presents, or causes to be presented, to an officer or employee of the United States . . . a false or fraudulent claim for payment or approval" or similar provisions in the False Claims Act. Nowhere in that Opinion is there reference to the decisions of other courts interpreting the very similar language contained in the earlier version of the statute. This is a fatal flaw because the Supreme Court interpreted the predecessor to Section (a)(1) broadly to include claims presented to grantees and intermediaries. Moreover, Congress acknowledged this broad interpretation with approval at the time that it amended the statute in 1986.

Consequently, as the Supreme Court has stated, "In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language and made it part of the enactment.'" *Shapiro v. United States*, 385 U.S. 1, 16 (1948).[2]

The Supreme Court in *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), interpreting the predecessor of Section 3729(a)(1), endorsed a broad reading of presentment that applied the FCA to claims that were not presented to the United States Government.[3] There Mr. Marcus, acting on behalf of the United States, alleged that contractors rigged the bidding process for public projects in the Pittsburgh area. The contracts at issue were between the contractors and the local governments. (*Id*). *The United States was not a party*

2. *See also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) ("So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *In re North*, 50 F.3d 42, 45 (D.C. Cir. 1995) ("It is settled law that when a statute has an authoritative interpretation, and Congress reenacts it without change, 'Congress is presumed to be aware of [the] interpretation . . . and to adopt that interpretation . . ."); *Dart v. United States*, 848 F.2d 217, 229 (D.C. Cir. 1988), citing Lorillard, "Congress is presumed to be aware of an administrative or judicial interpretation of the statute . . ."; *United States v. Fed. Maritime Comm'n*, 694 F.2d 793, 809 (D.C. Cir. 1982), ("we presume Congress was aware of interpretations that recognized the Department's independent role -- both as a co-respondent and as a petitioner -- under the scheme of review created by the Urgent Deficiencies Act. We further conclude that Congress adopted those interpretations by carrying forward relevant prior law into the Hobbs Act.")

3. Before 1982, sections (a)(1) and (a)(2) were combined as two distinct clauses of the same provision. *See* 31 U.S.C. § 231. (1976 ed.)

to the contracts. (Emphasis added) However, the Federal Government provided substantial funds to finance the local projects and monitored the projects. (*Id.* at page 539, 543). The checks to pay the contractors were drawn on accounts in the name of the local governments. (*Id.*)

The contractor convinced the Third Circuit that the FCA did not reach its conduct because no claims were actually presented to the Government and the payments were generated from local accounts. The Third Circuit reasoned:

> To the word "claim" has been attributed several legal meanings. It is used as an equivalent for "cause of action", "debt", "demand", "existing right" and "unadjudicated obligation". Through them all however runs the sense of something owing from one party to another. The statement of the facts upon which that obligation is asserted to depend may of course be false, but if true would spell out something like an action of assumpsit or debt. It is something quite different to rely on facts which never could give rise to a promise, express or implied, to pay however amply they demonstrate a cheat. . . . The plaintiff seeks to come within the statutory words by stressing the fact that the periodical estimates for partial and final payment were presented to an officer of the PWA. This fact does not surmount the requirement that the claim must be one "against the United States Government or a department or officer thereof." The question is not merely to whom is something presented, it is also what is presented. A claim against the United States means "a right to demand money from the United States."

> The defendants at no time had such a right. The defendants' contracts were exclusively with the local municipalities. Neither the United States of America nor any of its departments, officers or agencies was a party to said contracts. No promise was made by the United States Government nor any department or officer thereof to pay the defendants for their work. Nor was any specific fund prescribed by the defendants' contracts for their payment. Since the local municipalities were the only parties who promised to pay the defendants, the defendants could look solely to this source for payment. Where the local municipalities obtained the funds to pay the contractors was immaterial as between local municipalities and the defendants. The claims of the defendants then were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer status.

United States ex rel. Marcus, et al. v. Hess, et al., 127 F.2d 233, 236-37 (3d Cir. 1942).

A majority of the U.S. Court of Appeals for the District of Columbia Circuit saw the presentation of a claim to the government as a plain, statutorily indispensable basis for FCA liability:

> Indeed, Totten and the United States never connect the dots in their argument based on subsection (c). Whatever that argument may show about what constitutes a "claim," it does not respond to the plain requirement of subsection (a)(1) that, to be

> actionable under the False Claims Act, any such claim must be presented to an officer or employee of the United States Government. As Judge Randolph noted in *Totten I*, it is clear on the face of the statute that "no matter how 'claim' is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee." 286 F.3d at 554 (Randolph, J., concurring). *Totten II*, *supra*, at 493.

Yet in *Hess*, the Supreme Court found FCA liability where there was no presentation of a claim. As the Third Circuit makes clear, the presentation of estimates to the Public Works Administration never amounted to the presentation of a "claim" under any definition of that word. It is thus misleading for the majority in *U.S. ex rel. Totten v. Bombardier*, *supra*, to stress the forwarding of the estimates for approval by the PWA (*Totten II*, *supra*, at 502) because that presentation had no (a)(1) significance whatsoever. The Supreme Court found FCA liability in *Hess* because a federal grantee had been defrauded of government funds, and the intent of the legislature was to recover every purloined penny:

> Government money is as truly expended whether the checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. . . .These funds are as much in need of protection from false claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. . . . *The fraud here could not have been any more an effort to cheat the United States if there had been no state intermediary.* *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943). [Emphasis Added]

The Supreme Court, at page 542, indicates that the conduct of the contractors in *Hess* violated the provision stating "every person who . . . causes to be presented for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be fraudulent." This demonstrates that the Court defined "presented for payment . . . any claim upon the or against the Government of the United States" to encompass claims presented to intermediaries and paid out of accounts partially funded by federal dollars. This supports Totten's position that Section 3729 (a)(1) was violated by Bombardier and Envirovac in the case at bar, *i.e.*, that a claim presented to an intermediary, and/or grantee, like Amtrak, is effectively a claim presented to the government.

The First Circuit addressed whether presentation to a grantee invokes the FCA in *Murray & Sorrenson v. United States*, 207 F.2d 119 (1st Cir. 1953).[4] Assessing whether a claim presented to a contractor would support liability under the False Claims Act, the court concluded that it did: "The fact that claims in this case were not presented directly to the government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute." *Id.* at page 123.

The Third Circuit, in a *per curiam* decision, *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966),[5] rejected the argument that the FCA did not control where false claims were made to a private corporation that made the payments.

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4. Cited with approval in the legislative history to the 1986 Amendment. *See* A&P S. Rep. 99-345 at page 8.

5. Cited with approval in the legislative history to the 1986 Amendment. *See* A&P S. Rep. 99-345 at page 8.

The court noted that the private corporation was reimbursed by the United States for all of the monies that it expended in connection with a government contract, including the fraudulently obtained sums. *Id.* at page 449.

Accordingly, at the time of the 1982 and 1986 Amendments, the presentation clause had been held to apply the FCA to intermediaries and grantees.[6] It is presumed as a matter of statutory construction that Congress was aware of this judicial construction. *See Shapiro*. However, here this presumption can be verified by specific references in the legislative history where Congress approvingly acknowledged this interpretation. *See* footnotes 4 and 5, *supra*. The majority opinion in the instant case departs markedly from this and must be reversed.[7]

2. As a mixed government corporation under 31 U.S.C. § 9101, Amtrak was the Government.

The majority of the panel in *U.S. ex rel Totten v. Bombardier*, *supra*, cites Amtrak's Section 541 of the enabling statute that declares that Amtrak is not an agency or instrumentality of the United States Government and then concludes that a claim presented to Amtrak is not a claim presented to the United States. If Section 541 were the only Congressional expression of the status of Amtrak, this might

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6. Congress specifically disavowed court opinions that restricted the FCA from covering fraud claims that were not presented to Government. Rep. 99-345 1986 U.S.C.C.A.N. 5266, Page 22.

7. The U.S. Court of Appeals for the District of Columbia's decision in *Totten II*, *supra*, is the only decision since the 1982 and 1986 Amendments to the FCA to restrict the application of the FCA where the fraud claim was presented to a grantee.

end the inquiry. However, as argued in Totten's Brief, Congress had placed Amtrak on the list of mixed ownership government corporations until December 1997. 31 U.S.C § 9101. How could Amtrak appear on this list and not be the United States Government for purposes of 31 U.S.C. § 3729(a)(1)?

The D.C. Circuit answered this question by referring to *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) and quoting the passage stating that Section 541 is "assuredly dispositive of Amtrak's status as a Government entity for purposes that are within Congress's control." *Totten II*, *supra*, at 492. But, the majority opinion does not complete the quotation. The full quotation is

> Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control - for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities such as the Administrative Procedure Act, . . . the Federal Advisory Committee Act, . . . and the laws governing Government Procurement.

(Statutory citations omitted). *Lebron* at page 392. In context, this statement by the *Lebron* Court recognizes the authority of Congress to define the status of Amtrak in statutory matters. *Lebron* suggests that Congress has the authority to apply these laws to Amtrak if Congress so desires. *Lebron* does not, as inferred by the majority, resolve the question of Amtrak's status in this case. Congress pursuant to *Lebron* apparently has the power to decide when Amtrak will be

treated like the Government and when it will be treated like a corporation in statutory matters. *Id.*[8]

As indicated above, at Section 541 of Rail Passenger Service Act of 1970, Congress declared that Amtrak was not an agency or instrumentality of the United States Government. However, in the same legislative act, pursuant to Section 804, Congress added Amtrak to the list of Mixed Ownership Government Corporations. Public Law 91-518, Section 804 (October 30, 1970). This change was achieved under a section of the Rail Passenger Service Act of 1970 entitled "Accountability." It amended Section 201 of the Government Corporation Control Act (formerly 31 U.S.C. § 856) to add the National Passenger Railroad Corporation as a Mixed Ownership Government Corporation.

By giving effect to Section 541 over Section 804, the D.C. Circuit ignored a Congressional mandate worthy of greater weight. Neither Section 541 nor the *Lebron* passage cited by the majority indicates a Congressional desire to

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8. *Lebron* never mentions 31 U.S.C. § 9101 in its analysis. However, Congress has treated Amtrak like a government entity on several occasions: (1) Congress created the Office of Inspector General for Amtrak because Congress considered Amtrak to be a "federal entity." 5 U.S.C. App. 3, Section 8E(a)(2); (2) Congress made Amtrak subject to the Freedom of Information Act, 5 U.S.C. Section 552 because of "the substantial federal funds which are going to Amtrak." S. Rep. No. 756, 92nd Congress, 2nd Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 6267, 6274; (3) Congress gave Amtrak intergovernmental immunity making it exempt from state and local taxes and fees. 49 U.S.C. § 24301 (1) and *See United States v. Mexico*, 455 U.S. 720, 735 (1982) (immunity for Amtrak appropriate when "an agency or instrumentality is so closely connected to the government that the two cannot realistically be viewed as separate entities.")

exclude Amtrak, the recipient of billions of dollars of federal funds, from the protection of the False Claims Act. Neither Section 541 nor the cited *Lebron* passage manifests a Congressional intent to treat Amtrak like a private corporation and not as part of the Government for purposes of the False Claims Act. But, by making Amtrak a Mixed Government Corporation pursuant to Section 804, Congress expressed a clear intent for Amtrak to be treated like the Government for purposes of "Accountability."

The Government Corporation Control Act was originally passed in 1945 "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof." Public Law 248, Chapter 557, Section 2 (December, 1945). To accomplish this end, the law required the Comptroller General to conduct annual audits of Government Corporations and Mixed Ownership Government Corporations. *Id.* The law further required the Comptroller General to report any unauthorized financial transactions. *Id* at Section 203.[9] Accordingly, Congress obviously designated Amtrak as a Mixed Government Corporation with the intent to gain further oversight and control over the federal funds that it was appropriating and to look for unauthorized transactions. Applying the FCA, 31 U.S.C § 3729, to claims presented to Amtrak, and treating Amtrak as the Government for purposes of the FCA, furthers the express goal of Congress when it made it a Mixed Ownership Government Corporation. The majority opinion undermines this goal.

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9. "The report shall also show specifically any program, expenditure, or other financial transaction observed in the course of the audit, which, in the opinion of the Comptroller General has been carried on or made without the authority of law."

Moreover, by citing *Rainwater v. United States*, 356 U.S. 590 (1958), Totten did not intend to suggest that the Commodity Credit Corporation, a wholly owned Government Corporation, and Amtrak, a Mixed Government Corporation limited by Section 541, are the same. The structural distinctions that separate them are clear. However, until December 1997 they were both listed as "Government Corporation[s]" as defined by Congress in 31 U.S.C. § 9101(1).[10] Amtrak, given its close relationship with the Government and extensive federal funding, should be treated like "the Government of the United States for purposes of the False Claims Act", *See Rainwater* at page 591-592, to carry out this Congressional purpose: "to protect the funds and property of the Government regardless of the particular form, or function, of the government instrumentality upon which such claims are made." *Id.* at page 592.

3. Circuit Judge Garland's dissenting opinion hews to the letter and the legislative history of the FCA regarding presentation of claims to federal grantees.

a. The differing language of subsections (a)(1) and (a)(2) commands an inference that these provisions describe differing ways in which FCA liability can be incurred.

It is plain that subsection (a)(1) pertains to a false claim presented to the government and that subsection (a)(2) pertains to a false claim without presentation to the government. The legislative history depicts Congress (at the time of the 1986 amendments to the FCA) as gravely intent

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10. Section 9101(1) states: "Government Corporation" means a mixed ownership Government corporation and a wholly owned Government Corporation.

upon protecting every threatened penny of the federal fisc. Despite the overarching zeal of Congress to achieve that end, the Court concludes that Congress was not seeking to shorten the distance between wrongful conduct and FCA culpability. Instead, the D.C. Circuit in *Totten II*, implicitly saw (a)(1) as creating another tier of the federal bureaucracy, a U.S. Department of Re-Presentation, to which every invoice paid by every federal grantee must be sent lest procurement thieves go unpunished.

The D.C. Circuit noted that (a)(2) "is the direct descendant of a clause that could only be read in conjunction with" (a)(1), (*Totten II*, *supra*, at 500), but the fact remains that paragraphs (a)(1) through (7) are now separate statements of the various ways in which one can violate the FCA. The pointed lack of a presentation requirement in (a)(2), as the dissenter notes, calls for the canon of construction that Congress' inclusion of particular language in one section of a statute and its omission of that language from another is intentional. *Totten II*, *supra*, Dissent at 505, citing and quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

Among the untenable ironies of the D.C. Circuit's construction is that, under subsection (a)(3), a person who conspires to defraud a grantee with respect to federal funds would be liable, but that under (a)(2), a person who actually achieves undeserved payment from the grantee would not. This outcome thwarts the letter and legislative history of the FCA.

As the dissenter observed (*Totten II*, *supra*, at 505), the D.C. Circuit reduced subsection (a)(2) to a matter of inculpating those who make false claims indirectly, asserting to no avail that they are protected for not having made false claims themselves. (*Totten II*, *supra*, at 501).

The D.C. Circuit thus marginalized the significance of (a)(2), but the dissenter had a withering reply: ". . . [s]ince this reading still implies that *someone* must have presented the claim for liability to attach under subsection (a)(2), it does not appear to differ from liability under (a)(1) . . ." (*Totten II*, *supra*, at 507).

b. Section 3729 (c) further underscores the clear legislative intent to protect federal dollars given to grantees.

As indicated above, having amended the statute in 1982 and 1986 without significantly altering the language concerning presentment, Congress evinced satisfaction with the judicial interpretations of the clause in effect at the time. However, as if to punctuate this point, Congress added Section (c) that defines "claim" as

> any request or demand . . . made to a grantee . . . if the United States Government provides any portion of the money or property which is requested or demanded or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

As the Government argued challenging the district court, strictly interpreting section (a)(1) to require the presentation of a claim to a government official renders the first portion of Section (c) meaningless. If a claim is defined as a demand for money which was in part satisfied by federal funds, then based upon the majority's interpretation, such a claim is not covered in and of itself. To be covered, the claim must be presented to an official of the United States Government. This interpretation reads this

clause out of the statute or adds another requirement not found on the face of the statute.

Congress spelled out its intent in defining claim. *United States v. Azzarelli Construction Co., et. al.*, 647 F.2d 757 (7th Cir. 1981) is widely cited for the proposition that a claim must first be presented to the United States to be actionable under the FCA. While the court made this statement in discussing the statutory framework of the FCA (*see* page 759), the primary holding of the case is that the FCA does not apply because, in the view of the Seventh Circuit, the United States had suffered no injury. *Id.* at 762. However, in reaction to this statement and other courts that sought to limit the reach of the FCA, Congress crafted the definition of claim. The Legislative History states:

> [I]n United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981), the Court held that because the Federal contribution to highway construction was a fixed sum rather than openended . . . the Federal Government could not sue the contractors who had engaged in a bid-rigging conspiracy. This narrow reading of the act throws the entire burden of prosecuting fraud on state officials who may not have the powerful remedies available to the United States under the False Claims Act or the sophisticated investigative resources to even establish the fraud. *Thus, the Committee intends the new subsection [c] to overrule Azzarelli and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors, or other recipients of federal funds.* [Emphasis added] A&P S. Rep. 99-345 page 18 to 19; at page 19.

CONCLUSION

For the foregoing reasons, Totten asks this Court to grant the Petition for A Writ of Certiorari.

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